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current/modified discharge characteristics, water quality, biological conditions or oceanographic characteristics must:

(i) Demonstrate that they made a diligent effort to provide such information with their application and were unable to do so, and

(ii) Submit a plan of study, including a schedule, for data collection and submittal of the additional information. EPA will review the plan of study and may require revisions prior to authorizing submission of the additional information.

(h) *Tentative decisions on section 301(h) modifications.* The Administrator shall grant a tentative approval or a tentative denial of a section 301(h) modified permit application. To qualify for a tentative approval, the applicant shall demonstrate to the satisfaction of the Administrator that it is using good faith means to come into compliance with all the requirements of this subpart and that it will meet all such requirements based on a schedule approved by the Administrator. For compliance with §§ 125.60 and 125.65, such schedule shall be in accordance with § 125.59(f)(3)(ii).

(i) *Decisions on section 301(h) modifications.* (1) The decision to grant or deny a section 301(h) modification shall be made by the Administrator and shall be based on the applicant's demonstration that it has met all the requirements of §§ 125.59 through 125.68.

(2) No section 301(h) modified permit shall be issued until the appropriate State certification/concurrence is granted or waived pursuant to § 124.54 or if the State denies certification/concurrence pursuant to § 124.54.

(3) In the case of a modification issued to an applicant in a State administering an approved permit program under 40 CFR part 123, the State Director may:

(i) Revoke an existing permit as of the effective date of the EPA issued section 301(h) modified permit; and

(ii) Cosign the section 301(h) modified permit if the Director has indicated an intent to do so in the written concurrence.

(4) Any section 301(h) modified permit shall:

(i) Be issued in accordance with the procedures set forth in 40 CFR part 124, except that, because section 301(h) permits may be issued only by EPA, the terms "Administrator or a person designated by the Administrator" shall be substituted for the term "Director" as appropriate; and

(ii) Contain all applicable terms and conditions set forth in 40 CFR part 122 and § 125.68.

(5) Appeals of section 301(h) determinations shall be governed by the procedures in 40 CFR part 124.

(j) *Grandfathering provision.* Applicants that received tentative or final approval for a section 301(h) modified permit prior to February 4, 1987, are not subject to § 125.60, the water quality criteria provisions of § 125.62(a)(1), or § 125.65 until the time of permit renewal. In addition, if permit renewal will occur prior to August 9, 1996, applicants may have additional time to come into compliance with §§ 125.60 and 125.65, as determined appropriate by EPA on a case-by-case basis. Such additional time, however, shall not extend beyond August 9, 1996. This paragraph does not apply to any application that was initially tentatively approved, but as to which EPA withdrew its tentative approval or issued a tentative denial prior to February 4, 1987.

§ 125.60 Primary or equivalent treatment requirements.

(a) The applicant shall demonstrate that, at the time its modification becomes effective, it will be discharging effluent that has received at least primary or equivalent treatment.

(b) The applicant shall perform monitoring to ensure, based on the monthly average results of the monitoring, that the effluent it discharges has received primary or equivalent treatment.

(c)(1) An applicant may request that the demonstration of compliance with the requirement under paragraph (b) of this section to provide 30 percent removal of BOD be allowed on an averaging basis different from monthly (e.g., quarterly), subject to the demonstrations provided in paragraphs (c)(1)(i), (ii) and (iii) of this section. The Administrator may approve such requests if the applicant demonstrates

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to the Administrator's satisfaction that:

(i) The applicant's POTW is adequately designed and well operated;

(ii) The applicant will be able to meet all requirements under section 301(h) of the CWA and these subpart G regulations with the averaging basis selected; and

(iii) The applicant cannot achieve 30 percent removal on a monthly average basis because of circumstances beyond the applicant's control. Circumstances beyond the applicant's control may include seasonally dilute influent BOD concentrations due to relatively high (although nonexcessive) inflow and infiltration; relatively high soluble to insoluble BOD ratios on a fluctuating basis; or cold climates resulting in cold influent. Circumstances beyond the applicant's control shall not include less concentrated wastewater due to excessive inflow and infiltration (I&I). The determination of whether the less concentrated wastewater is the result of excessive I&I will be based on the definition of excessive I&I in 40 CFR 35.2005(b)(16) plus the additional criterion that inflow is nonexcessive if the total flow to the POTW (i.e., wastewater plus inflow plus infiltration) is less than 275 gallons per capita per day.

(2) In no event shall averaging on a less frequent basis than annually be allowed.

[59 FR 40658, Aug. 9, 1994, as amended at 61 FR 45833, Aug. 29, 1996]

§ 125.61 Existence of and compliance with applicable water quality standards.

(a) There must exist a water quality standard or standards applicable to the pollutant(s) for which a section 301(h) modified permit is requested, including:

(1) Water quality standards for biochemical oxygen demand or dissolved oxygen;

(2) Water quality standards for suspended solids, turbidity, light transmission, light scattering, or maintenance of the euphotic zone; and

(3) Water quality standards for pH.

(b) The applicant must: (1) Demonstrate that the modified discharge will comply with the above water quality standard(s); and

(2) Provide a determination signed by the State or interstate agency(s) authorized to provide certification under §§ 124.53 and 124.54 that the proposed modified discharge will comply with applicable provisions of State law including water quality standards. This determination shall include a discussion of the basis for the conclusion reached.

§ 125.62 Attainment or maintenance of water quality which assures protection of public water supplies; assures the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife; and allows recreational activities.

(a) *Physical characteristics of discharge.* (1) At the time the 301(h) modification becomes effective, the applicant's outfall and diffuser must be located and designed to provide adequate initial dilution, dispersion, and transport of wastewater such that the discharge does not exceed at and beyond the zone of initial dilution:

(i) All applicable water quality standards; and

(ii) All applicable EPA water quality criteria for pollutants for which there is no applicable EPA-approved water quality standard that directly corresponds to the EPA water quality criterion for the pollutant.

(iii) For purposes of paragraph (a)(1)(ii) of this section, a State water quality standard "directly corresponds" to an EPA water quality criterion only if:

(A) The State water quality standard addresses the same pollutant as the EPA water quality criterion and

(B) The State water quality standard specifies a numeric criterion for that pollutant or State objective methodology for deriving such a numeric criterion.

(iv) The evaluation of compliance with paragraphs (a)(1) (i) and (ii) of this section shall be based upon conditions reflecting periods of maximum stratification and during other periods when discharge characteristics, water quality, biological seasons, or oceanographic conditions indicate more critical situations may exist.

(2) The evaluation under paragraph (a)(1)(ii) of this section as to compliance with applicable section 304(a)(1)